(Slip Opinion)

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BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.

In re:	)	
Lyon County Landfill	)	CAA Appeal No. 98-6
Docket No. 5-CAA-96-011	)	

[Decided August 26, 1999]

REMAND ORDER

Before Environmental Appeals Judges Scott C. Fulton, Ronald L. McCallum, and Edward E. Reich.

LYON COUNTY LANDFILL

CAA Appeal No. 98-6

REMAND ORDER

Decided August 26, 1999

Syllabus

This is an appeal by the Director of the Air and Radiation Division, U.S. EPA Region V ("Region"), from an Initial Decision by Administrative Law Judge Barbara A. Gunning ("Presiding Officer"). The appeal arises out of an administrative enforcement action for alleged violations of the Clean Air Act ("CAA"), 42 U.S.C. §§ 7401-7671q, at the Lyon County Landfill in Lynd, Minnesota. The Region charged Lyon County with six violations of section 112 of the CAA, 42 U.S.C. § 7412, for allegedly handling asbestos-containing waste improperly and failing to maintain complete, accurate, and timely records and maps of the areas in which asbestos waste was disposed.

In her Initial Decision, the Presiding Officer dismissed the administrative complaint for lack of jurisdiction. The decision turned on the Presiding Officer's interpretation of CAA section 113(d)(1), which states:

> The [EPA] Administrator's authority [to assess administrative penalties] shall be limited to matters where the total penalty sought does not exceed $200,000 and the first alleged date of violation occurred no more than 12 months prior to the initiation of the administrative action, *except* where the Administrator and the Attorney General jointly determine that a matter involving a larger penalty amount or longer period of violation is appropriate for administrative penalty action. Any such determination by the Administrator and the Attorney General shall not be subject to judicial review.

CAA § 113(d)(1), 42 U.S.C. § 7413(d)(1) (emphasis added).

Here, the first alleged date of violation was more than twelve months prior to the initiation of the administrative action. EPA had, however, obtained a waiver

determination for this case signed by both EPA and the Department of Justice ("DOJ") pursuant to the exceptions clause of section 113(d)(1). After reviewing the waiver, the Presiding Officer concluded that it was invalid because the alleged violations involved neither more than $200,000 in penalties nor a "longer period of violation," as that term is used in the statute. The Presiding Officer interpreted "longer period of violation" as meaning the duration of a violation, thereby allowing for waivers to be issued only in cases involving violations that continue for more than a twelve-month period. Such a violation did not occur in this case, so the Presiding Officer dismissed the complaint.

On appeal, the Region argues that the Presiding Officer has no authority to rule on the legality of the waiver issued by EPA and DOJ under CAA section 113(d)(1). The Region also contends that the Presiding Officer misinterpreted the statutory term "longer period of violation" by construing it as equivalent to the duration of a violation. Instead, the Region contends that as used in section 113(d)(1), "period of violation" merely indicates the time between the first date of an alleged violation and the date EPA files an administrative complaint.

Held: The narrow scope of the Presiding Officer's decision to review the section 113(d)(1) waiver determination is consistent with her authority and responsibility under the part 22 rules, for she reviewed it solely to determine whether the statutory preconditions that enable EPA and DOJ to exercise their discretionary authority to issue a waiver had been satisfied. Such review need not interfere with EPA and DOJ's prosecutorial discretion as to whether, from a policy perspective, to pursue an enforcement case in an administrative, rather than a judicial, forum. This portion of the Initial Decision is therefore affirmed. The Board, however, overrules the Presiding Officer's holding that violations of a non-continuing nature occurring more than twelve months before the initiation of an administrative action cannot qualify for a waiver under CAA section 113(d)(1). Contrary to the Presiding Officer's interpretation, the exceptions clause of section 113(d)(1) does *not* contain a durational component. Rather, the clause is more properly read to authorize waivers in cases where violations of any duration occurred more than twelve months prior to initiation of the administrative action. Such an interpretation creates less strain on the language of section 113(d)(1) than the alternative chosen by the Presiding Officer, is more consonant with the statute's structure, is compatible with the legislative history, and advances important policy objectives. The Board therefore reinstates the administrative complaint and remands this case to the Presiding Officer for consideration on the merits.

Before Environmental Appeals Judges Scott C. Fulton, Ronald L. McCallum, and Edward E. Reich.

Opinion of the Board by Judge Reich:

This is an appeal by the Director of the Air and Radiation Division, U.S. EPA Region V ("Region V" or "Region"), from an Initial Decision by Administrative Law Judge Barbara A. Gunning ("Presiding Officer"). The appeal arises out of an administrative enforcement action for alleged violations of the Clean Air Act ("CAA" or "Act"), 42 U.S.C. §§ 7401-7671q, at the Lyon County Landfill in Lynd, Minnesota. The Region charged Lyon County with six violations of section 112 of the CAA, 42 U.S.C. § 7412, for allegedly failing to comply with the National Emission Standards for Hazardous Air Pollutants ("NESHAP") for active asbestos waste disposal sites, 40 C.F.R. § 61.154. The Region contended that Lyon County handled asbestos-containing waste improperly and failed to maintain complete, accurate, and timely records and maps of the areas in which asbestos waste was disposed. *See* Complaint and Notice of Opportunity for Hearing on Proposed Administrative Order Assessing Penalties ¶¶ 23-31, 33-44, 46-52, 54-58, 60-62, 64-75 [hereinafter Complaint].

In her Initial Decision, the Presiding Officer dismissed the administrative complaint for lack of jurisdiction. *See* Order Granting Respondent's Motion to Dismiss Complaint (Aug. 21, 1998) [hereinafter Init. Dec.].[1] The decision turned on the Presiding Officer's interpretation

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[1]Judge Gunning specified that her Order constituted an Initial Decision. Init. Dec. at 11 ("[i]nasmuch as this Order disposes of all issues and claims in the above-cited proceeding, it constitutes an Initial Decision"); *see* 40 C.F.R. § 22.20(b)(1) (if "decision to dismiss is issued as to all the issues and claims in the proceeding, the decision constitutes an initial decision").

We note that the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation or Suspension of Permits, 40 C.F.R.

(continued...)

of CAA section 113(d)(1), which authorizes EPA to bring administrative penalty actions for, among other things, violations of the asbestos NESHAP. *See* CAA § 113(d)(1), 42 U.S.C. § 7413(d)(1). The Region claims that the Presiding Officer's interpretation of section 113(d)(1) is erroneous and asks that the Initial Decision be reversed. Lyon County opposes the Region's appeal.

For the reasons set forth below, we affirm the Presiding Officer's findings in part, reverse them in part, and reinstate and remand the complaint to the Presiding Officer for consideration of the merits of the case.

I. *BACKGROUND*

A. *Statutory Background*

Under the CAA, whenever EPA obtains information that a person has, among other things, violated rules promulgated in accordance with section 112 of the Act (such as the asbestos NESHAP), the Agency "may issue an administrative order against [that] person assessing a civil administrative penalty of up to $25,000[] per day of violation."[2] CAA § 113(d)(1), 42 U.S.C. § 7413(d)(1). EPA's power to bring such actions is not boundless. The statute restricts the availability of civil administrative remedies for CAA violations as follows:

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[1](...continued)
pt. 22, were amended on July 23, 1999, and became effective on August 23, 1999. *See* 64 Fed. Reg. 40,138 (July 23, 1999). All citations to the part 22 rules in this decision refer to the rules that were in effect just prior to the issuance of these amendments.

[2]Subsequent to the violations at issue in this case, Congress enacted the Debt Collection Improvement Act of 1996. The Act directs EPA (and other federal agencies) to adjust maximum civil penalties on a periodic basis to reflect inflation. *See* 61 Fed. Reg. 69,360 (Dec. 31, 1996). In accordance with the statute, EPA promulgated inflation-adjusted maximum penalties that apply to violations occurring after January 30, 1997. *See* 40 C.F.R. pt. 19.

> The Administrator's authority [to assess administrative penalties] shall be limited to matters where the total penalty sought does not exceed $200,000 and the first alleged date of violation occurred no more than 12 months prior to the initiation of the administrative action, except where the Administrator and the Attorney General jointly determine that a matter involving a larger penalty amount or longer period of violation is appropriate for administrative penalty action. Any such determination by the Administrator and the Attorney General shall not be subject to judicial review.

CAA § 113(d)(1), 42 U.S.C. § 7413(d)(1).

B. *Factual and Procedural Background*

Lyon County, Minnesota owns and operates the Lyon County Landfill in Lynd, Minnesota. At the time of the events alleged in the complaint, the landfill accepted asbestos waste from construction sites and other sources. *See, e.g.*, Hearing Transcript at 26-27, 31-32 [hereinafter Tr.]. On July 20-21, 1994, inspectors from the Minnesota Pollution Control Agency ("MPCA") visited the landfill and allegedly observed particulate matter (dust and debris) emissions from asbestos waste lying exposed on the top of the landfill. Tr. at 26-27, 57-78, 85-93. The inspectors also allegedly found that Lyon County's waste shipment records were incomplete and that the County had committed several related mapping and notification violations. Tr. at 27-29, 79-84.

After attempting unsuccessfully to resolve the matter with Lyon County, the MPCA referred the case to EPA Region V. The Region responded by filing an administrative complaint against the County on August 14, 1996, approximately twenty-five months after the MPCA's inspection. In the complaint, the Region charged Lyon County with six violations of the NESHAP work practices and recordkeeping requirements and sought $58,000 in administrative penalties. *See* Complaint ¶¶ 23-31, 33-44, 46-52, 54-58, 60-62, 64-75, 77. Notably, the

Region did not specifically allege that any of the purported violations were continuing in nature. Instead, the Region stated:

> Even though the period of violations alleged began over 12 months ago, U.S. EPA and the U.S. Attorney General have determined that this case is appropriate for administrative resolution, and have jointly waived for this case the applicable limitation of Complainant's authority to issue an administrative penalty order under Clean Air Act Section 113(d)(1).

Complaint ¶ 21.

In support of this fundamental component of its case, Region V included in its prehearing exchange a letter that it claimed comprised the waiver agreement between EPA and the Department of Justice ("DOJ"). *See* Complainant's Initial Prehearing Exchange at 18 & ex. C-19 (Sept. 22, 1997). The document submitted, however, was not the waiver determination but rather a DOJ letter requesting additional information regarding EPA's waiver request. *See id*. ex. C-19. The Region discovered this error only a few days before the hearing and quickly filed a supplement to its prehearing exchange that substituted the correct document for the incorrect one. *See* Letter from Andre Daugavietis, Associate Regional Counsel, EPA Region V, to The Honorable Barbara A. Gunning, Administrative Law Judge, U.S. EPA at 1, atts. 1-2 (May 28, 1998). Lyon County objected to the Region's request and alleged that the Region's failure to produce the waiver determination resulted in a lack of administrative jurisdiction over this matter. *See* Respondent's Memorandum in Support of Opposition to Supplement to Complainant's Prehearing Exchange at 1-3 (June 1, 1998); *see also* Init. Dec. at 3-4.

Although the Presiding Officer accepted the Region's corrected exhibit, Lyon County raised an oral motion objecting to jurisdiction at the start of the evidentiary hearing. Tr. at 15-16. Lyon County claimed that CAA section 113(d)(1) does not authorize administrative prosecution in

this case because the case involves alleged violations that began and ended more than twelve months prior to the initiation of the action. *See id*. The Presiding Officer held Lyon County's oral motion in abeyance until after the evidentiary hearing, *id*. at 16, and both parties briefly addressed the jurisdictional issue in their posthearing briefs. *See* Lyon County's Post-Hearing Memorandum at 2-4 (July 30, 1998); Complainant's Reply to Respondent's Proposed Findings of Fact, Conclusions of Law, and Order for Judgment and to Lyon County's Post-Hearing Memorandum at 10-11 (Aug. 14, 1998).

In her Initial Decision, the Presiding Officer dismissed the action against Lyon County, holding that EPA lacks the authority to issue an administrative penalty order against the County. Init. Dec. at 10. The Presiding Officer found that the twelve-month limitations period in CAA section 113(d)(1) had expired prior to the initiation of this action.[3] She then reasoned that the waiver determination proferred by the Region was invalid because the alleged violations involved neither more than $200,000 in penalties nor an ongoing violation that had continued for more than a twelve-month period. *Id*. at 6-10. This appeal followed, and the Environmental Appeals Board ("Board") subsequently ordered oral

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[3]The Presiding Officer held that the term "initiation of the administrative action," as used in CAA § 113(d)(1), means the date an administrative complaint is filed with an EPA regional hearing clerk. Init. Dec. at 7 (citing *In re Coleman Trucking, Inc.*, Dkt. No. V-CAA-96-005 (ALJ, Nov. 6, 1996)). The Presiding Officer noted:

> The filing of the complaint with the Regional Hearing Clerk is the logical point at which to consider an action initiated because of its precise date and because of the respondent's notice of the action through the concomitant service requirement.

Id. (citing 40 C.F.R. § 22.05(a)-(b)). The parties do not dispute this determination on appeal.

argument on the issues surrounding the interpretation of section 113(d).[4] That argument took place on May 13, 1999. *See* Oral Argument Transcript [hereinafter Oral Arg. Tr.].

II. *DISCUSSION*

On appeal, Region V claims that in deciding to dismiss the complaint, the Presiding Officer erred in three fundamental ways. First, the Region argues that the Presiding Officer has no authority to rule on the legality of the waiver issued by EPA and DOJ under CAA section 113(d)(1). Second, the Region contends that the Presiding Officer misinterpreted the statutory term "longer period of violation," as used in section 113(d)(1), by construing it as equivalent to the "duration" of a violation. The Region asserts that this construction led to the Presiding Officer's allegedly erroneous conclusion that a waiver cannot be obtained for any violation -- such as this one -- that both begins and ends more than twelve months before an administrative complaint is filed. Third and finally, the Region argues that the Presiding Officer committed procedural errors in dismissing this matter on the basis of an argument allegedly not raised in the answer and without a written motion by Respondent, as purportedly required under the Consolidated Rules of

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[4]The Board's order requesting oral argument asked the parties to focus on the following two issues:

(1) In light of the statutory prohibition on judicial review of waiver decisions made by the Administrator and Attorney General, may a Presiding Officer review the validity of a section 113(d)(1) waiver in the course of an administrative enforcement action brought pursuant to such a waiver?

(2) Is the provision for waiver of the limitations period in Clean Air Act section 113(d)(1) applicable to administrative enforcement actions alleging violations that occurred more than 12 months prior to initiation of the enforcement action where the alleged violations are not continuing or repeated in nature?

Order Scheduling Oral Argument at 4-5 (EAB, Feb. 18, 1999).

Practice, 40 C.F.R. pt. 22, that govern these proceedings. Each of these contentions is addressed below.

A. *Reviewability of Waiver Determinations*

1. *Statutory Authority*

We turn first to the argument that administrative law judges ("ALJs") lack authority to rule on the legality of section 113(d)(1) waivers. This argument, if supportable, would quickly dispose of the case before us. In its appeal brief, the Region argues primarily that a party may not challenge the basis for a waiver in any forum, even an administrative one, because section 113(d)(1) explicitly prohibits judicial review of waiver determinations. Appellant's Appeal Brief at 34 [hereinafter Appeal Brief]. To support this argument, the Region points to the statute, which states:

> Any such [waiver] determination by the Administrator and the Attorney General shall not be subject to judicial review.

CAA § 113(d)(1), 42 U.S.C. § 7413(d)(1). In its brief, the Region appears to interpret the term "judicial review" as encompassing any kind of review by a deliberative body, including administrative review. *See* Appeal Brief at 33-34.

At oral argument, the Region backed away from its statutory argument and instead admitted that administrative review of waiver determinations could be provided for in the part 22 regulations that govern these administrative proceedings *without* violating CAA section 113(d). Oral Arg. Tr. at 6-7, 11-12. For example, when asked "[i]f, hypothetically, EPA wanted to make appropriate changes to Part 22, do you think that they could provide a role to the ALJs to review a waiver without violating 113(d)," the Region responded "[r]ight. I think that could be done." *Id*. at 12. Moreover, the Region stated:

> [REGIONAL COUNSEL]: The real question is whether or not the matter is something that is set to come before the ALJ under the Part 22 rules, and we submit that the waiver issue is not. The waiver issue is complete when it's made, and that is buttressed by the fact it is made in conjunction with another agency, DOJ, who has no rights or roles to come before the [Board], or even an ALJ.
> JUDGE REICH: So are you saying that, in terms of constraint, it is a constraint that comes out of Part 22, as opposed to a constraint that comes out of the preclusion of judicial review in the statute itself?
> [REGIONAL COUNSEL]: Correct. I think the fundamental reasons that the ALJ did not have authority to make this decision here, to overrule the final decision, comes from the Part 22 rules and the [Administrative Procedure Act]. Section 113(d)'s prohibition of judicial review is relevant but is not dispositive, as the ALJ does not undertake judicial review.

Oral Arg. Tr. at 6-7.

In light of these and similar statements at oral argument, we find that the Region abandoned the argument that administrative review of section 113(d)(1) waivers is explicitly prohibited under the CAA. Thus, we will not consider it further.

2. *Authority of Presiding Officer to Act Independently of Agency*

The Region also argues that the CAA authorizes the Administrator and the Attorney General to decide whether to issue a waiver, and thus ALJs, as subordinates of the Administrator, may not make independent determinations regarding the validity of waiver decisions. Appeal Brief at 37; Oral Arg. Tr. at 13. The Region describes the waiver determination as a matter of Agency policy that a

Presiding Officer has no authority to review under 40 C.F.R. pt. 22 and may not "overturn" in his or her decision. Appeal Brief at 38-40; Oral Arg. Tr. at 16-18. At oral argument, the Region clarified its position somewhat, conceding that an ALJ "can rightfully find that the EPA has no jurisdiction to bring [a] case administratively" if he or she finds that a waiver has not been granted for a particular case. Oral Arg. Tr. at 16, 67-68. According to the Region, however, an ALJ can inquire, for jurisdictional purposes, only into whether a waiver was issued by the proper parties for the case at issue, *id*. at 67-68, and cannot go beyond that by analyzing the appropriateness of the waiver on the facts of the case. *Id*.

At one level, it may be reasonable to view waiver determinations solely as an element of EPA's prosecutorial discretion. Decisions about which cases to prosecute, what violations to allege, what amounts of penalties to seek, and whether to bring an administrative or judicial penalty action may all turn on prosecutorial judgment and agency policy. *See, e.g.*, *In re B&R Oil Co.*, RCRA (3008) Appeal No. 97-3, slip op. at 16 (EAB, Nov. 18, 1998), 8 E.A.D. ___ ("courts have traditionally accorded governments a wide berth of prosecutorial discretion in deciding whether, and against whom, to undertake enforcement actions"). Indeed, the decision to seek a waiver of the jurisdictional limitations in CAA section 113(d)(1) may be viewed simply as a policy decision regarding whether to proceed in an administrative or judicial forum. That type of decision is appropriately reserved to enforcement personnel. *See, e.g.*, *Heckler v. Chaney*, 470 U.S. 821, 832-33 (1985) (agency enforcement decisions are "'committed to agency discretion'" and are presumptively unreviewable; presumption may be rebutted only in cases "where the substantive statute has provided guidelines for the agency to follow in exercising its enforcement powers"); *In re GMC Delco Remy*, RCRA Appeal No. 95-11, slip op. at 22 n.35 (EAB, June 2, 1997), 7 E.A.D. ___ ("the rule in American law is that investigation and prosecution by federal agencies are discretionary functions. * * * Decisions on prosecutorial strategy are a means by which agencies develop their enforcement policies and priorities in light of congressional goals and their areas of responsibility"); *In re Borough of Ridgway*, 6 E.A.D. 479, 494 (EAB

1996) (EPA is "entitled to flexibility in its choice of an enforcement action to the fullest extent consistent with the statute").

The Presiding Officer's review of the waiver determination in this case, however, simply analyzed whether the statutory conditions for a waiver determination were satisfied. *See* Init. Dec. at 6-10. The question examined by the Presiding Officer was not whether the waiver was "appropriate" but rather whether it could have been lawfully issued. As such, the Presiding Officer was not second-guessing an exercise of enforcement discretion, as the Region alleges, *see* Oral Arg. Tr. at 4, but rather was making a legal determination regarding whether the statutory conditions for use of a waiver were satisfied. By reviewing the waiver determination, the Presiding Officer was seeking to ensure that administrative penalty authority was properly invoked such as to provide a jurisdictional basis for her proceeding. This function is distinct from the determination whether a waiver, if available, should actually be granted in a particular case.

Certainly, neither an ALJ nor the Board may invalidate a waiver determination simply because, in the ALJ's (or Board's) judgment, a case should have been brought in a judicial forum. Within EPA, that type of judgment would interfere with the enforcement discretion entrusted to the Office of Enforcement and Compliance Assurance ("OECA"). *See* U.S. EPA, *Delegations Manual* § 7-6-A ¶ 3.e (1994) (delegating EPA Administrator's authority to make waiver determinations to the Assistant Administrator for Enforcement and Compliance Assurance). However, it is legitimate for an ALJ to ensure that a statute actually authorizes a penalty action based on the facts of a particular case. An ALJ who independently reviews the jurisdictional basis of a case is not superseding OECA's role but is simply ensuring that administrative penalty authority is, in fact, legally available.

The CAA requires, in general, that administrative penalty assessments under section 113(d)(1) be made after opportunity for a hearing on the record in accordance with the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 554, 556. CAA § 113(d)(2)(A), 42 U.S.C.

§ 7413(d)(2)(A). EPA's regulations governing APA proceedings provide for a hearing to be presided over by an ALJ and the opportunity for appeal to the Board. 40 C.F.R. §§ 22.04(c), .30. In the course of part 22 proceedings, Presiding Officers may hear and decide issues of fact, law, and discretion. *Id*. § 22.04(c)(7). In addition, a Presiding Officer has the authority to dismiss an administrative penalty action at any time on the basis of the Agency's "failure to establish a prima facie case or *other grounds [that] show no right to relief on the part of the complainant.*" *Id*. § 22.20(a) (emphasis added); *see* Oral Arg. Tr. at 37, 41-42, 58-59 (Lyon County arguments on this point). This authority is clearly broad enough to cover a ruling on the issue of jurisdiction, especially in cases where jurisdiction is potentially limited by statute.[5]

3. *Summary*

On balance, the narrow scope of the Presiding Officer's decision to review the section 113(d)(1) waiver determination is consistent with her authority and responsibility under the part 22 rules, for she reviewed it solely to determine whether the statutory preconditions that enable EPA and DOJ to exercise their discretionary authority to issue a waiver had been satisfied. Such review need not, and indeed should not, interfere with EPA and DOJ's authority to determine, from a policy perspective, when to use the waiver tool.

[5] The ALJs and the Board have issued rulings on jurisdictional issues in previous cases, thus determining whether a particular administrative enforcement action may proceed. *See*, *e.g.*, *In re Hardin County*, 5 E.A.D. 189, 192-202 (EAB 1994) (affirming ALJ's decision that EPA has no jurisdiction to enforce federal or state mixture rule issued under the Resource Conservation and Recovery Act ("RCRA")); *In re Gordon Redd Lumber Co.*, 5 E.A.D. 301, 308-15 (EAB 1994) (EPA has jurisdiction to bring a RCRA penalty action against respondent in a state with an approved RCRA program).

B. *Interpretation of "Longer Period of Violation"*

We turn next to the issues surrounding the Presiding Officer's interpretation of the term "longer period of violation," as used in CAA section 113(d)(1). As mentioned in Part I.A above, section 113(d)(1) is structured to include two express limitations on the exercise of administrative penalty authority, followed by an exception to each of those limitations. The express limitations are that an administrative penalty order may only be issued in "matters where [1] the total penalty sought does not exceed $200,000 and [2] the first alleged date of violation occurred no more than 12 months prior to the initiation of the administrative action." CAA § 113(d)(1), 42 U.S.C. § 7413(d)(1). The exceptions, for their part, provide that the limitations may be waived "where the Administrator and the Attorney General jointly determine that a matter involving a [1] larger penalty amount or [2] *longer period of violation* is appropriate for administrative penalty action." *Id*. (emphasis added).

Region V raises a series of arguments to establish that the phrase "longer period of violation" cannot reasonably be construed to mean what the Presiding Officer held: that "longer period of violation" is equivalent to the "duration" of a violation. The Region contends that as used in section 113(d)(1), "period of violation" merely indicates the time between the first date of a violation and the date EPA files an administrative complaint. To support this interpretation, the Region: (1) attempts to harmonize the limitations and exceptions clauses of section 113(d)(1) in a way that differs from the Presiding Officer's efforts to do the same; (2) points to language used in other portions of section 113 and relies on canons of statutory construction to argue that similar language within a statute should be accorded a consistent meaning; (3) cites legislative history; and (4) makes several policy arguments. We address each argument in turn below.

1. *Interpretation of "Longer Period of Violation" Through an Analysis of the Limitations and Exception Clauses of Section 113(d)(1)*

In the Initial Decision, the Presiding Officer analyzed the meaning of the phrase at issue by, among other things, drawing parallels between the limitations and exceptions clauses of section 113(d)(1). The Presiding Officer looked to the relationship between the term "larger penalty amount" in the exceptions clause and "$200,000" in the limitations clause and concluded that a similar relationship must exist between the term "longer period of violation" in the exceptions clause and "first alleged date of violation occurred no more than 12 months prior to the initiation of the administrative action" in the limitations clause. *See* Init. Dec. at 8-9. She reasoned that "larger penalty amount" means more than $200,000, so "longer period of violation" must mean a violation of longer duration than twelve months. *Id*. at 9. To justify this conclusion, the Presiding Officer highlighted Congress' decision to trigger the twelve-month limitations period on the first date of violation rather than the last date of violation (as is done in many statutes of limitation). She noted, however, that "[i]n the absence of this [first-date requirement], it would be reasonable to find that the phrase 'longer period of violation' refers simply to the remoteness of the intervening period between the date of violation and the filing of the complaint." *Id*.

The Region offers a competing argument based on its own analysis of the interplay between the limitations and exceptions clauses of section 113(d)(1). *See* Appeal Brief at 17-18. The Region agrees that "longer period of violation" in the exceptions clause does relate back to the time period specified in the limitations clause. *See* Oral Arg. Tr. at 32-33. However, the Region suggests that "longer period of violation" refers to a passage of time that is longer than "12 months prior to initiation of an administrative action." Appeal Brief at 17. Thus, the Region reads the exceptions clause as authorizing a longer period of time between the date of the first violation and the date of the complaint. The Region's interpretation would allow remote-in-time violations of short duration to qualify for an administrative waiver, unlike the Presiding

Officer's interpretation, which appears to permit use of the waiver only in cases where the duration of a violation exceeds twelve months. *See* Init. Dec. at 9.

We agree with both the Presiding Officer and the Region that in construing the statute, it is reasonable to expect that the exceptions clause would harmonize with the corresponding portion of the limitations clause (as it does with the penalty limitation). The Presiding Officer's approach, however, is strained and violates rather than upholds the plain language rule she cites. *See id.* at 6, 8. The limitations clause simply states that the first alleged date of violation may not be more than twelve months previous to the issuance of the complaint. The clause does not provide any guidance whatsoever regarding the nature or duration of the violation, *e.g.*, short-term, continuing, multiple; indeed, as the Region notes, section 113(d)(1) does not mention the term "duration" at all. Appeal Brief at 13-14; *see* Oral Arg. Tr. at 47. If the goal is to harmonize separate clauses of one sentence, it would be highly artificial to introduce a durational requirement into one clause when the parallel clause makes no mention of such an idea.

In our view, the more natural reading of the exceptions clause is simply to extend the twelve-month period preceding the date of the administrative action, as the Region argues. Congress no doubt could have chosen clearer language than "longer period of violation" to achieve this result, but the phrase does not necessarily compel a contrary meaning. On the whole, this approach provides a logical and harmonious interpretation of both clauses in section 113(d)(1).

Lyon County, however, contends that this interpretation would allow EPA to bring cases otherwise precluded by the five-year general federal statute of limitations at 28 U.S.C. § 2462. Brief of Appellee at 5 (EPA "could conceivably extend the statute of limitations beyond the statutory five (5) year period by simply bringing an administrative complaint regardless of the length of violation"). This argument is fallacious. The general federal statute of limitations operates independently of the CAA and unquestionably would apply to actions

brought administratively regardless of our interpretation of section 113(d)(1). *See, e.g.*, *3M Co. v. Browner*, 17 F.3d 1453, 1455-57 (D.C. Cir. 1994) (general federal statute of limitations applies to civil penalty cases brought before agencies).

At oral argument, Lyon County also repeatedly raised the Presiding Officer's point that the interpretation we are adopting "makes the exception larger than the rule, and * * * gives [the agencies] unfettered, unbridled, unlimited jurisdiction that Congress * * * has not provided." Oral Arg. Tr. at 52; *see* Init. Dec. at 9 (the exceptions clause is "rendered superfluous by the *carte blanche* waiver posited by the EPA to be available upon joint determination with the [DOJ]"). This argument must fail because it attributes no significance whatsoever to the structure of the statute: *i.e.*, all enforcement matters may be brought in federal court in accordance with section 113(b), a limited subset of these matters may be brought by EPA administratively without DOJ's concurrence, and additional matters may be brought administratively but only with DOJ's concurrence. Indeed, there is a meaningful distinction between, on the one hand, Congress granting EPA limited jurisdiction over precisely delineated cases (*i.e.*, cases less than a year old, involving relatively small penalties), and, on the other hand, requiring DOJ's concurrence as a precondition to EPA's assertion of jurisdiction over cases other than those falling into the first category. Because it is determinative of whether matters proceed administratively or in district court, DOJ's concurrence can hardly be viewed as "superfluous."

2. *Interpretation of "Longer Period of Violation" by Reference to Other Portions of Section 113*

Of the various statutory provisions cited by the Region in support of its position, apart from the structure of sections 113(b) and (d)(1), only section 113(e) even arguably brings anything to the analysis. In that subsection, the phrase "duration of the violation" is used as a factor to consider in determining the amount of a penalty. *See* CAA § 113(e), 42 U.S.C. § 7413(e). Citing the maxim "*expressio unius est exclusio alterius*" ("the expression of one thing is the exclusion of another"), the

Region argues with some force that if Congress had intended to limit use of the section 113(d)(1) waiver to cases involving violations of long duration, it would have used the phrase "duration of violation" as it did in section 113(e). Appeal Brief at 19.

The Region makes a persuasive case that, if Congress had intended the provision to apply as the Presiding Officer found, it could have expressed that intention more clearly. However, it is also true that if Congress had intended the provision to apply as the Region suggests, it could have stated that intention more clearly as well.

Thus, we find that an analysis of provisions of the Clean Air Act other than sections 113(b) and (d)(1) does not add substantially to the analysis. A review of those collateral provisions certainly does not undermine, and rather in a small way supports, our conclusion that the interpretation urged by the Region better fits the statutory language than the Presiding Officer's interpretation.

3. *Legislative History*

The legislative history, which Region V also relies on to support its expansive interpretation of the waiver clause, is likewise not terribly instructive on this question. The Region argues that Congress amended section 113 to enhance EPA's enforcement authority by, among other things, providing for administrative penalty actions. In light of this, the Region contends that it is contrary to congressional intent to construe the waiver provision as narrowly as the Presiding Officer did: her construction purportedly would authorize waivers only for violations of more than twelve months' duration that continue into the twelve-month period prior to the filing of the complaint.[6] Appeal Brief at 20-21. The

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[6]The Presiding Officer wrote:

> [A]n exception to the one-year limitation period may be obtained

(continued...)

Region claims that this construction "leaves the Administrator with so little discretion that administrative authority is effectively restricted to an unvarying one-year limit." *Id*.

Congress added the language currently codified as section 113(d) in the Clean Air Act Amendments of 1990 ("CAAA"). *See* CAAA, Pub. L. No. 101-549, tit. VII, § 701, 104 Stat. 2399, 2677-79 (codified at CAA § 113(d), 42 U.S.C. § 7413(d)). The Region quotes several passages from the legislative history as evidence of Congress' intent to grant EPA broad discretion in matters of administrative enforcement. *See* Appeal Brief at 21-25.

Notably, most of the excerpts quoted by the Region do not pertain specifically to the administrative penalty authority in section 113(d). Rather, they are part of general discussions of the overall enforcement enhancements provided in the CAAA. *See*, *e.g.*, *id*. at 24 ("the conference agreement includes a number of provisions that 'enhance the enforcement authority of the Federal government under the [CAA] while at the same time providing substantive procedural safeguards'") (quoting H.R. Conf. Rep. No. 101-952, at 13 (1990), *reprinted in* 1990 U.S.C.C.A.N. 3385, 3879). Our review of the legislative history leaves no doubt that the CAAA significantly enhanced EPA's CAA enforcement tools. These enhancements involved not only the new administrative penalty authority but also included improved civil

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[6](...continued)
when there is a violation of a longer period; that is, when the violation period itself exceeds the 12-month period prior to the filing of the complaint. An example of this type of situation is where there is a continuing or repeated violation spanning a period of more than 12 months and this violation continued into the one-year period preceding the filing of the complaint.

Init. Dec. at 9 (footnote omitted). It is unclear whether the Presiding Officer's reference to a violation continuing into the 12-month period prior to the issuance of the complaint is actually part of her interpretation or only an example.

(judicial) and criminal enforcement authority and a field citation program, all of which are incorporated into section 113. *See* CAA §§ 113(b)-(d), 42 U.S.C. §§ 7413(b)-(d); S. Rep. No. 101-228, at 357 (1990), *reprinted in* 1990 U.S.C.C.A.N. 3385, 3740 (section 113 amendments, among other things, "broaden[] the scope of activities that can be the subject of civil or criminal sanctions * * * [and] create[] a new administrative citation authority under which EPA can assess administrative penalties"). However, much less can be gleaned regarding Congress' expectations about how the administrative penalty authority would operate. Indeed, there is virtually nothing in the legislative history that directly addresses the limitations period and/or the administrative waiver provision. Accordingly, the legislative history is less persuasive in this context than the Region's brief suggests.

For example, Region V quotes the House Committee on Energy and Commerce's report as stating:

> EPA's authority cannot exceed $200,000 and the alleged violation must have occurred within 12 months prior to the administrative action, unless EPA and the Attorney General jointly determine that a matter involving a larger penalty amount and a longer period of violation is appropriate for administrative penalty action.

Appeal Brief at 22. This language is virtually identical to the language at issue here, but the Region nonetheless attempts to use it to support its position.[7] The Region's reading of this piece of legislative history

[7]In this regard, we note in passing a law review article published in 1991 by Representative Henry Waxman, the then-Chairman of the House Subcommittee on Health and the Environment, which had jurisdiction over the Clean Air Act. In referencing the CAA § 113(d)(1) amendments, Representative Waxman wrote:

> In general, EPA must assess the penalties within one year of the first day of violation. However, if the Administrator and the Attorney

(continued...)

stretches the limit of what the excerpt will comfortably support.

Overall, the legislative history offers little guidance on the particular language at issue in this appeal. Indeed, the legislative history does not address why or how the section 113(d)(1) language was chosen. The general discussions of the agencies' enhanced enforcement authority are insufficient to infer Congress' specific intent regarding CAA section 113(d)(1), though they do provide some context for the policy issues that may have motivated the adoption of section 113(d)(1).

4. *Policy Considerations*

The Region expresses concern that the Presiding Officer's holding will require EPA to bring enforcement actions in cases such as this in federal court. The Region contends that EPA's enforcement resources can be used more efficiently when the Agency has greater discretion over whether to proceed in an administrative or judicial forum. Appeal Brief at 27.

The Region also argues that the Presiding Officer's holding will lead to "illogical and absurd" results because only cases that involve extremely large penalty amounts will qualify for a waiver. *Id*. at 30-31; Oral Arg. Tr. at 24, 26-27. To prove this point, the Region provides

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[7](...continued)
General concur that higher civil penalties and longer violations are appropriate, EPA can proceed to assess the penalties.

The Honorable Henry A. Waxman, *An Overview of the Clean Air Act Amendments of 1990*, 21 Envtl. L. 1721, 1810 n.432 (Summer 1991). While some may argue that this language provides support for the Presiding Officer's conclusion that duration is inherent in the CAA § 113 waiver provision, we do not find that it compels such a reading. While Rep. Waxman played a key role in the Clean Air Act Amendments process, this article is ultimately an expression of his view only. Moreover, the term "longer violations," as used in the context of Rep. Waxman's footnote, is not markedly clearer in meaning than the "longer period of violation" passage cited by the Region.

examples of hypothetical cases, one involving a one-day violation that occurred thirteen months before initiation of an administrative action and a second case involving a continuing violation that began four years before initiation of an administrative action. *See* Appeal Brief at 31. The Region argues that under the approach set forth in the Initial Decision, only the continuing violation case would qualify for an administrative waiver. *Id*. at 31-32. The Region concludes that such an outcome, in which "almost the only type of case for which waiver of the 12-month exception is available would be an enormous case in terms of seriousness and penalty amount," is illogical. *Id*. at 32.

The Region's policy argument for preserving an administrative forum for "small" cases has force. An enforcement action involving a small number of violations and a relatively low penalty amount often can be more efficiently addressed through the administrative process than through district court litigation. The potential effect of the Initial Decision appears to be that, with respect to small cases that are more than one year old, enforcement personnel will be faced with the choice of judicial enforcement or no enforcement action at all. This result is inconsistent with Congress' desire to make CAA enforcement more flexible.[8]

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[8]Lyon County's principal argument in this appeal is that the enforcement action brought by the Region was "stale" by the time it was initiated, 25 months after the date of the alleged violations. Brief of Appellee at 7. Lyon County argues that the limitations clause of section 113(d)(1) is designed to force EPA to bring its administrative penalty actions in a timely manner (*i.e.*, within 12 months). *Id*. at 10; Oral Arg. Tr. at 62.

In so arguing, Lyon County ignores the role of 28 U.S.C. § 2462, the federal statute of limitations, which operates as an absolute bar to truly "stale" claims, as discussed in Part II.B.1, *supra*. While the statute makes clear that section 113(d)(1) would *ordinarily* (*i.e.*, without the need for a waiver) be used for recent violations where smaller penalties are being sought, the waiver provision by its very nature is intended to expand the range of possible use.

5. *Summary*

In sum, we overrule the Presiding Officer's holding that remote-in-time violations of a non-continuing nature do not qualify for a waiver under CAA section 113(d)(1). The exceptions clause of section 113(d)(1) is more properly read to authorize waivers in cases where violations occurred more than twelve months prior to initiation of the administrative action. Such an interpretation creates less strain on the language of section 113(d)(1) than the alternative proposed by the Presiding Officer, is compatible with the legislative history of section 113(d)(1) (which is minimal), and is more consonant with the statute's language and structure.

Such an interpretation also advances important policy objectives. Alleged violations that are greater than one but less than five years old are, of course, subject to potential judicial enforcement regardless of how section 113(d)(1) is interpreted. However, an interpretation that provides for the possibility of using an administrative forum could benefit both the Agency and potential respondents by potentially reducing the transaction costs involved in an enforcement action. Further, it avoids cluttering the burgeoning dockets of the federal courts with matters that can be effectively handled in an administrative forum. Significantly, such an interpretation does not guarantee that waivers will be issued on a routine basis. Instead, it is left to EPA and DOJ, subject to congressional oversight,[9] to ensure that the waiver authority is not abused.

C. *Alleged Procedural Improprieties*

Finally, the Region argues that the Presiding Officer committed procedural errors in dismissing this matter on the basis of an argument

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[9]As the Region points out, the House Committee on Energy and Commerce directed EPA and DOJ to maintain records of waiver determinations and the reasons for them "'since the Committee would most likely be interested, as time goes on, in such matters.'" Appeal Brief at 35 (quoting H.R. Rep. No. 101-490, at 393 (1990)).

allegedly not raised in the answer and without a written motion by Respondent, as purportedly required under the Consolidated Rules of Practice. Given our disposition of this case on the foregoing arguments, we need not reach these issues.

III. *CONCLUSION*

For the reasons discussed above, we affirm the Presiding Officer's decision to evaluate the legality of EPA and DOJ's joint waiver of the statutory limitation on administrative penalty authority in this case. We reverse, however, the Presiding Officer's interpretation of "longer period of violation," as that phrase is used in CAA section 113(d)(1). In light of the statutory language and structure, legislative history, and policy arguments made in this case, we find that the better reading of the phrase is that it simply refers to a period of time greater than twelve months between the first date of a violation and the date of the complaint. Accordingly, we reinstate the complaint and remand this case to the Presiding Officer for resolution on its merits.

So ordered.